

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 Adv. Case No. 20-06594-rdd

5 - - - - - x

6 In the Matter of:

7

8 SEARS HOLDINGS CORPORATION,

9

10 Debtor.

11 - - - - - x

12 SEARS, ROEBUCK AND CO. et al.,

13 Plaintiff,

14 v.

15 CLEVA HONG KONG LTD.,

16 Defendants.

17 - - - - - x

18

19 United States Bankruptcy Court

20 300 Quarropas Street, Room 248

21 White Plains, NY 10601

22

23 December 14, 2021

24 10:20 AM

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1 B E F O R E :

2 HON ROBERT D. DRAIN

3 U.S. BANKRUPTCY JUDGE

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5 ECRO: JUSTIN WALKER

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1 HEARING re 18-23538-rdd Sears Holdings Corporation Notice of
2 Agenda of Matters Scheduled for Hearing to be Conducted
3 Through Zoom on December 14, 2021 at 10:00 a.m.
4

5 HEARING re 18-23538-rdd Sears Holdings Corporation Motion to
6 Approve Compromise / Debtors' Motion for Authorization and
7 Approval of Settlement and Mutual Release among Sears,
8 Roebuck and Co., Sears Holdings Corporation, and 233 S.
9 Wacker, LLC Pursuant to Bankruptcy Rule 9019 filed by
10 Jacqueline Marcus on behalf of Sears Holdings Corporation
11 (ECF # 10099)
12

13 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
14 and Co. et al v. Cleva Hong Kong Ltd.
15 Motion to Dismiss Adversary Proceeding filed by Michael R.
16 Herz on behalf of Cleva Hong Kong Ltd. (ECF #4)
17

18 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
19 and Co. et al v. Cleva Hong Kong Ltd.
20 Affidavit Declaration of Hong Chen (related document(s)4)
21 Filed by Michael R. Herz on behalf of Cleva Hong Kong Ltd.
22 (ECF #5)
23
24
25

1 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
2 and Co. et al v. Cleva Hong Kong Ltd.
3 Notice of Hearing on Motion to Dismiss Adversary Proceeding
4 (related document(s)4) filed by Michael R. Herz on behalf of
5 Cleva Hong Kong Ltd. (ECF #6)
6
7 Certificate of Service Regarding Motion to Dismiss Adversary
8 Proceeding, Declaration in Support, Notice of Hearing
9 (related document(s)6, 5, 4) Filed by Michael R. Herz on
10 behalf of Cleva Hong Kong Ltd. (ECF 37)
11
12 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
13 and Co. et al v. Cleva Hong Kong Ltd.
14 Memorandum of Law (related document(s)4) filed by Brigette
15 McGrath on behalf of Kmart Holding Corporation, Sears,
16 Roebuck and Co. (ECF # 12)
17
18 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
19 and Co. et al v. Cleva Hong Kong Ltd.
20 REPLY OF DEFENDANT CLEVA HONG KONG LTD. IN SUPPORT OF MOTION
21 TO DISMISS ADVERSARY PROCEEDING PURSUANT TO FEDERAL RULE OF
22 CIVIL PROCEDURE 12(b)(5) (related document(s)9, 4) filed by
23 Michael R. Herz on behalf of Cleva Hong Kong Ltd. (ECF #14)
24
25

1 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
2 and Co. et al v. Cleva Hong Kong Ltd.

3 Affidavit DECLARATION OF MICHAEL R. HERZ, ESQ. IN SUPPORT OF
4 MOTION OF DEFENDANT CLEVA HONG KONG LTD., TO DISMISS
5 ADVERSARY PROCEEDING PURSUANT TO FEDERAL RULE OF CML
6 PROCEDURE 12(b)(5) (related document(s) 14) Filed by Michael
7 R. Herz on behalf of Cleva Hong Kong Ltd. (ECF #15)

8
9 HEARING re Adversary proceeding: 20-06594-rdd Sears, Roebuck
10 and Co. et al v. Cleva Hong Kong Ltd.

11 REPLY OF DEFENDANT CLEVA HONG KONG LTD. IN SUPPORT OF MOTION
12 TO DISMISS ADVERSARY PROCEEDING PURSUANT TO FEDERAL RULE OF
13 CML PROCEDURE 12(b)(5) AND DECLARATION OF MICHAEL HERZ IN
14 SUPPORT THEREOF (related document(s) 15, 14) Filed by
15 Michael R. Herz on behalf of Cleva Hong Kong Ltd. (ECF #16)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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6 BY: MICHAEL K. MCCARRELL (TELEPHONICALLY)

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8 ALSO PRESENT TELEPHONICALLY:

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10 KARA E. CASTEEL

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12 PHILIP D. ANKER

13 SARA BRAUNER

14 PHIL DIDONATO

15 ZACH LANIER

16 DOMINIC LITZ

17 JACQUELINE MARCUS

18 ERIKA MORABITO

19 BRITTANY NELSON

20 GARY POLKOWITZ

21 NATAN BANE

22 THOMAS DAVIS

23 KEVIN ECKHARDT

24 PATRICK ENG

25 SCOTT FRIEDMAN

1 UDAY GORREPATI
2 TAYLOR HARRISON
3 ANA LUCIA HURTADO
4 CHLOE A. JASPER
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1 P R O C E E D I N G S

2 THE COURT: Good morning. This is Judge Drain.
3 We're here today in in Re Sears Holdings Corporation, et al.
4 We're handling these matters completely remotely, primarily
5 by Zoom, unless someone doesn't have access to a screen, in
6 which case, they will be appearing by telephone.

7 So I have the agenda for today's session. And at
8 least on the agenda, there's just one matter scheduled; all
9 the other ones are adjourned or stated that there'll be an
10 order submitted based on resolution on a consensual basis.

11 The matter that's contested is Kmart Holding
12 Corp., et al v. Cleve Hong Kong Ltd. and the defendant's
13 motion to dismiss.

14 There was some confusion, I think, as to whether
15 another matter might be back on the calendar, which is the
16 Debtors' motion for approval of a settlement involving the
17 Calder sculpture. That CNO was submitted, I think, Thursday
18 last week and I don't need a hearing on it. I was traveling
19 at that time, and have entered some, but not all of the
20 Sears orders that came in during that period.

21 So if anyone is on for that matter, and assuming
22 that there, in fact, were no objections to the motion, I did
23 have a chance to review the motion this morning and I don't
24 need a hearing on it.

25 MR. FAIL: Thank you, Judge. Garrett Fail, Weil

1 Gotshal, on behalf of the Debtors. Appreciate your
2 attention to that matter and for the update for parties in
3 interest.

4 THE COURT: All right. So why don't we then turn
5 to the Cleva Hong Kong Ltd. motion, which is motion under
6 Bankruptcy Rule 7012, incorporating Federal Rule of Civil
7 Procedure 12(b)(5), seeking an order dismissing the
8 adversary proceeding on the basis of lack of or insufficient
9 service of process.

10 MR. BROWN: Good morning, Your Honor. This is
11 Nick Brown on behalf of the plaintiffs.

12 THE COURT: Good morning.

13 MR. HERZ: Good morning, Your Honor. Michael Herz
14 at Fox Rothschild on behalf of Cleva Hong Kong, and with me
15 today is my colleague from South Carolina, Kevin McCarrell,
16 and Kevin will be presenting argument for Cleva Hong Kong
17 today.

18 THE COURT: Okay, very well. So I've reviewed the
19 parties' pleadings on this, namely the motion itself with
20 the attached declaration of Hong Chen, the Debtors'
21 objection to the motion with the attached declaration of
22 Bethany Rubis, and the movant's reply with Mr. Herz's
23 declaration.

24 This was not scheduled as an evidentiary hearing,
25 as I understand it, so I'm focusing primarily on the

1 parties' arguments and undisputed facts at this point. And
2 I think those would include the two summonses and the
3 certificate of service, but parties should tell me if
4 there's any other undisputed fact that they think is
5 relevant.

6 But with that introduction, I'm happy to hear
7 brief oral argument.

8 MR. MCCARRELL: Thank you, Your Honor. Kevin
9 McCarrell of Fox Rothschild Law Firm on behalf of plaintiff,
10 Cleve Hong Kong. We are here today on a motion to dismiss
11 the Debtors' adversary proceeding, which the Debtors seek
12 (sound glitch) in allegedly preferential transfers.

13 Your Honor, the basis of our motion is quite
14 lucrative point of sale (sound glitch). First, the Second
15 Circuit established the per se rule that plaintiffs serving
16 as (sound glitch) defendant.

17 THE COURT: I'm sorry. You're fading in and out.
18 I'm not sure if that's because you're moving back and forth
19 from the mic, but if you can just be a little closer to your
20 microphone, I'd appreciate it.

21 MR. MCCARRELL: Okay. Sorry about that, Your
22 Honor.

23 First, Your Honor, the Second Circuit has
24 established per se ruling that a plaintiff serving an
25 international defendant must commence service within 90 days

1 under Rule 4(m), and the plaintiffs have conceded that they
2 failed to do so.

3 Second, Your Honor, even if the Court were to
4 apply the (sound glitch) standard, flexible due diligence,
5 the plaintiffs' delay in this case (sound glitch).

6 And third, Your Honor, this Court entered a
7 procedures order governing this adversary proceeding, along
8 with other adversary proceedings, that set forth the
9 deadlines that (sound glitch), many of which have quite well
10 passed. And this procedures order specifically provides for
11 dismissal (sound glitch).

12 Your Honor, I understand you've reviewed the
13 briefing, so I won't (sound glitch) background facts. I
14 will mention -- I don't know if we said this in our
15 pleadings -- Cleva Hong Kong is a manufacturer of vacuum
16 cleaners and (sound glitch) and they sold goods (sound
17 glitch) --

18 THE COURT: I'm sorry. Can I interrupt you? I'm
19 hearing like every other word. I don't know what the -- do
20 you have headphones by any chance, Mr. McCarrell?

21 MR. MCCARRELL: I do not, Your Honor. I could
22 call in instead.

23 THE COURT: Well, I think you should do that. I
24 just want to make sure the transcript is clear.

25 MR. MCCARRELL: Okay. Thank you, Your Honor.

1 THE COURT: Okay.

2 MR. MCCARRELL: I apologize.

3 THE COURT: That's fine. That's fine, it's no
4 problem. Take your time to dial in.

5 MR. MCCARRELL: Your Honor, I pushed over to phone
6 audio. Is that any clearer?

7 THE COURT: That's much better. Thank you.

8 MR. MCCARRELL: Okay. I apologize, Your Honor.
9 And for the record, your law clerk did conduct an audio
10 check. Don't blame your employees because I'm not sure what
11 happened in the interim.

12 THE COURT: That's fine. That's fine. So you
13 were going to go into the factual background. But can I ask
14 you a couple of questions before then that I would like you
15 to focus on, either now or after you go through the factual
16 background.

17 The first is, under the case law, what is the
18 difference, if any, between the flexible due diligence
19 standard applied to a plaintiffs' actions to serve a foreign
20 defendant, which clearly applies if the efforts to undertake
21 service were commenced within the 90 days -- that's the
22 first standard -- and the standard generally under Rule 4(m)
23 and the Zapata line of cases, which recognize, first, that
24 the Court shall grant extension or recognize an exception to
25 the 90-day period upon a showing of good cause. And

1 further, under Zapata and the line of cases in the exercise
2 of discretion may do so even absent good cause.

3 What is the meaningful distinction between those
4 two standards?

5 MR. MCCARRELL: Well, Your Honor, I think the
6 first issue is accordance in order for the Court to give an
7 extension for good cause that the plaintiffs actually asked
8 for an extension, and they didn't. The plaintiffs never --
9 the plaintiffs sat on their hands for months after filing
10 its Complaint and never filed a motion requesting an
11 extension.

12 And so, Your Honor, the case law that I'm familiar
13 with when considering the good cause standard on a motion of
14 the plaintiff to extend. And, Your Honor, our position, of
15 course, is that we don't even need to get to the flexible
16 due diligence standard.

17 THE COURT: Well, the rule doesn't actually say
18 that. I'm sorry. The rule doesn't actually say that. It
19 says that if a defendant is not served within 90 days after
20 the Complaint is filed, the Court on motion must dismiss the
21 action without prejudice against that defendant or order
22 that service be made within a specified time. But if the
23 plaintiff shows good cause for the failure, the Court must
24 extend the time for service for an appropriate period.

25 So it doesn't really tie it into request for an

1 extension and, in fact --

2 MR. MCCARRELL: Well, I'm also familiar -- excuse
3 me, Your Honor, didn't mean to interrupt.

4 I'm also familiar, Your Honor, with case law in
5 which the judge issues a rule to show cause shortly after
6 the 90-day period had expired, and that may be another
7 opportunity for the plaintiffs to show good cause.

8 But I've not seen anything in this case where the
9 plaintiffs have affirmatively sought to show good cause.
10 Even in their response brief, you know, they filed an
11 affidavit talking about some of the issues with COVID, et
12 cetera, and, Your Honor, none of that is good cause for the
13 delay. The mail never stopped --

14 THE COURT: I'm going back to my question though,
15 Mr. McCarrell, which is what is the distinction between
16 flexible due diligence standard and either cause or the
17 exercise of discretion even without a showing of cause under
18 the Zapata case and in similar cases.

19 MR. MCCARRELL: And, Your Honor, I think to answer
20 that question. I'm not sure if you're answering whether
21 it's good cause or flexible due diligence. I don't know
22 that there is a whole lot of difference between the
23 standards that you're applying.

24 I think what I was suggesting earlier is that the
25 procedure in which these issues arise may be different in

1 some of the case law, but I'm not sure that the difference
2 in good cause or flexible due diligence is that different.

3 THE COURT: Okay. And then the other question I
4 had is, I think you should at some point address what missed
5 deadline in the procedures order prejudices the defendant.

6 MR. MCCARRELL: Well, Your Honor, I think
7 regarding the prejudice issue, I'd first like to point out
8 as we stated in our brief, the prejudice inquiry generally
9 only comes after determining that the plaintiffs' failure to
10 serve is not a result of their own negligence, and we cited
11 the Kogan v. Facebook case to that in our briefs.

12 Furthermore, Your Honor, the Second Circuit -- you
13 mentioned the Zapata case. The Second Circuit in Zapata
14 case specifically said that it's been prejudiced when
15 they're forced to defend what would be an otherwise time-
16 barred action, so there's prejudice there.

17 But to answer your question about specifically the
18 procedures order. If Your Honor is suggesting that the
19 plaintiffs had shown some sort of good cause for you to
20 amend your procedures order, then I understand your point
21 that we would perhaps not be prejudiced if all it takes is
22 for Your Honor to submit an amended procedures order.

23 But, Your Honor, we don't believe they've done
24 that; they have not shown good cause. And all of the
25 deadlines that have passed with regard to discovery, et

1 cetera have prejudiced us for your inability to defend what
2 would otherwise be a time-barred action.

3 THE COURT: Okay, so I interrupted you. You were
4 going through just the timeline here I think.

5 MR. MCCARRELL: Thank you, Your Honor.

6 So, yes, as I was I think indicating, Cleva is a
7 manufacturer of vacuum cleaners and other floor care
8 products, as well as ecofriendly gardening tools. They've
9 sold good to the Debtors on an extension of credit pursuant
10 to the agreement between the parties, as in a typical
11 preference action.

12 Of course, as Your Honor is well aware, the
13 Debtors filed their bankruptcy petition on October 15, 2018.
14 Although the plaintiffs' Complaint has a timestamp on it
15 indicating it may have been prepared as early as October
16 2019, they waited until a few days before the two-year
17 statute of limitations to file this action on October 9,
18 2020.

19 The clerk of court promptly issued a summons. The
20 initial summons stated that service -- that the response to
21 the Complaint was due within 30 days of issuance of the
22 summons. And the Debtors took no action from the time the
23 summons was issued until mid-March when they apparently
24 requested a second summons be issued.

25 And that second summons had different language in

1 the summons and said that it should be -- the response was
2 due within 30 days of service. They then waited another
3 month approximately before they served the pleadings to
4 their process server, who then apparently waited another
5 four months before they ever sent the pleadings abroad.

6 The plaintiffs have given no good cause or reasons
7 as to why the pleadings would not have been put in the mail
8 before they were.

9 And, Your Honor, I think we've hit the case
10 highlights. You know, the Second Circuit has --

11 THE COURT: I'm sorry. I'm sorry. But on the
12 facts, did Cleva Hong Kong file a claim in this case?

13 MR. MCCARRELL: Your Honor, I believe there was.
14 Yes, Your Honor, there was a proof of claim filed.

15 THE COURT: Okay.

16 MR. MCCARRELL: And we're not contesting the case
17 law that talks about, you know, filing a proof of claim, you
18 know, submitting yourself to the jurisdiction of the
19 Bankruptcy Court.

20 THE COURT: That's not why I asked it. I'm sure
21 you're about to tell me, but you don't need to. The
22 requirement to serve properly is separate and apart from
23 being within the jurisdiction of the Court for core versus
24 non-core purposes and the like. I was just curious as to
25 Cleva's awareness of the bankruptcy case and the plan

1 process.

2 Okay. You can go ahead.

3 MR. McCARRELL: Thank you, Your Honor.

4 Again, the Second Circuit, starting with the
5 Montalbano case in 1985 and running to (sound glitch) case
6 in 2010 has a string of increasingly clear statements that
7 in the Second Circuit, in order to serve an actual
8 defendant, you have to at least attempt within the 90-day
9 period required by Rule 4(m); and if not, the exception for
10 service of foreign entities is inapplicable.

11 And, Your Honor, the plaintiffs have cited some
12 cases that -- in the District Court level that apply to
13 flexible due diligence standards and suggest that there's
14 some sort of split among the District Courts about how to
15 apply the Second Circuit's rulings.

16 Your Honor, however, all the cases they cite were
17 before the Whitman case in 2005, which set forth perhaps the
18 strongest statement for the rule. And we have a series of -
19 - a string cite of cases in our brief taking up almost two
20 pages of our brief of District Court cases after that apply
21 the per se very clear rule that plaintiffs must attempt some
22 sort of step towards service within the 90 days or else the
23 case must be dismissed.

24 THE COURT: Although the Teligent case with its
25 analysis was affirmed in 2007 by the District Court.

1 MR. McCARRELL: Thank you, Your Honor. I would
2 have to go back and look at the affirmation to determine. I
3 appreciate you bringing that to my attention.

4 THE COURT: Okay.

5 MR. McCARRELL: But, Your Honor, even if Your
6 Honor were to apply the flexible due diligence standard, the
7 plaintiffs have failed to meet their burden. I already went
8 through the background there. You know, the plaintiffs have
9 indicated that they couldn't move forward because of COVID,
10 or they elected not to move forward because of COVID.

11 But, Your Honor, the case on your docket, Jupiter
12 Workshop -- and the adversary proceeding number there is 20-
13 06390. In that case, the same law firm that's here today
14 filed a declaration indicating that they had been told that
15 defendant was not going to accept service. They obtained a
16 new summons from the court the same day and put the
17 pleadings in the mail to their process server the same day.

18 There's no reason why the plaintiffs should have
19 sat on this for months and months without getting the
20 documents to the process server to start service attempts.
21 The suggestion that the process server told them, well,
22 there could be delays because of COVID, so we chose to do
23 nothing is nonsensical. If your process server is telling
24 you there's going to be delays, that ought to accelerate the
25 process so that you make sure that you're not the cog in the

1 wheel slowing down the process.

2 And so, Your Honor, again, even if you were to
3 apply the flexible due diligence standard, we believe the
4 facts are clear that the case should be dismissed.

5 And, Your Honor, we talked about the procedures
6 order. We also think that provides an additional basis for
7 dismissal of this action.

8 Unless Your Honor has any further questions for
9 me, that's my argument.

10 THE COURT: Okay. Under the case law, I had a
11 hard time finding a case in the foreign defendant context
12 where a court, at least in the Second Circuit, had granted a
13 motion to dismiss under Rule 12(b)(5) where service was
14 effectuated any earlier than a couple of months at least
15 over a year since the issuance of the summons.

16 Do you have any that do that?

17 MR. McCARRELL: Your Honor, as you're asking that
18 question, I believe there is one that was dismissed within
19 six months, that the name of it is not coming to me off the
20 top of my head and I'd have to dig into it to see if I'm
21 correct on that and which court that was.

22 THE COURT: Okay. And I guess there may have been
23 one like that where there was no attempt to serve
24 whatsoever. I mean, there still hadn't been when the motion
25 was brought. But I'm focusing on ones where there had been

1 an attempt; in fact, there had been service.

2 It seems to me the cases generally that grant
3 these types of motions either involve a situation where
4 there still had not been service or, alternatively, the time
5 was well past a year. For example: in Bozel, it was 25
6 months; in Travers Tool, it was over a year; in DEF, it was
7 two and a half years.

8 Maybe the one you're thinking of is Yellowave v.
9 Mana. But there, there'd been no attempt to serve in the
10 180 days before the motion was filed and no attempts
11 thereafter.

12 But if you or one of your colleagues can, you
13 know, maybe find one while I'm listening to Mr. Brown, you
14 can come back and let me know.

15 MR. MCCARRELL: Okay. Thank you, Your Honor. And
16 our position on that generally is, you know, it's not the
17 role of the attorney representing a defendant to bring to
18 the attention of the plaintiff that they have failed to
19 effect service. And so, you know --

20 THE COURT: I understand that, absolutely. In
21 fact, I think the record is clear, although Mr. Brown can
22 tell me otherwise, that the law firm for the plaintiff was
23 told in October of 2020 that the counsel for the Cleva
24 entity that they had spoken with was not a counsel for Cleva
25 Hong Kong and was not authorized to accept service, so I

1 think that record is clear.

2 I mean, you're right. The defendant doesn't have
3 to say anything as to whether you served them properly or
4 not. But beyond that, I think here, Sears was on notice
5 that they were going to have to serve through the Hague
6 Convention or otherwise serve abroad.

7 Okay. So why don't I hear from the plaintiff
8 then.

9 MR. BROWN: Thank you, Your Honor. I hope you can
10 hear me well.

11 THE COURT: Yes.

12 MR. BROWN: Thank you. Nick Brown on behalf of
13 the plaintiffs in this adversary proceeding. Thank you for
14 hearing us today.

15 Your Honor, last time I appeared before you, it
16 was on a telephone conference hearing, but it was on the
17 exact same issue in this same debtor case against Jupiter
18 Workshops, which is the preference proceeding that defense
19 counsel just referenced.

20 So Your Honor may recall we dealt with a very
21 similar issue on that one, and I'll be talking more about
22 that issue today because we have very similar facts today.

23 But first, Your Honor, I want to make sure that
24 the Court is clear, or at least that we can get some
25 clarity, on the record here regarding the awareness of the

1 defendant in October 2020 when this Complaint was filed. In
2 plaintiffs' response, we attached the declaration of Miss
3 Rubis, and to that declaration as Exhibit C is an email
4 chain between counsel in my office and counsel for the
5 defendant, which Your Honor had just referenced.

6 I can pull it up on the screen if it's helpful or
7 I can just refer to it. But important to know here is
8 within an hour of filing the Complaint, apparently, defense
9 counsel must have received automatic electronic notice or
10 somehow obtained it. We got an email from defense counsel
11 introducing themselves, saying -- here, I can pull it up
12 here if it's helpful -- saying, "I hope all is well and you
13 and the family are holding up during these crazy times."
14 Emphasis on crazy times because, of course, a big reason why
15 we opted not to immediately serve this Complaint is, of
16 course, because of COVID-19.

17 I mean, there's no reason to argue about the
18 significance of the pandemic and I'm not going to go into
19 that, but it is worth noting that defense counsel
20 acknowledged the craziness of the times that we were dealing
21 with.

22 Defense counsel went on to say, "I was hoping you
23 guys would somehow miss this one," referring to this
24 adversary proceeding. "I'm sure we'll have lots to
25 discuss."

1 We responded three days later, saying, "Hi. We
2 are well. Miss Rubis is handling this case, but you can
3 probably put it on a backburner for a long time (emphasis on
4 the word long) because foreign service is basically not
5 happening during COVID."

6 And Miss Rubis then replied herself later that
7 day, introducing herself and asking if defense counsel would
8 like to discuss the case. A couple of days later, she asked
9 defense counsel if they would be willing to accept service
10 on behalf of their client. And the response was, "Hi,
11 Bethany. We are not authorized to accept service. Thank
12 you. Mike."

13 There was no explanation from Mr. Herz that his
14 firm did not represent Cleva Hong Kong. There was no
15 indication that we should not be corresponding with Mr. Herz
16 on this case. And remember, Mr. Herz reached out to us
17 about this adversary proceeding and said it was simply we
18 are not authorized to accept service.

19 So, yes, we understood early on that we would need
20 to formally serve process through the Hague Convention or
21 some other acceptable means, but we always understood that
22 Mr. Herz and his firm represented the defendant. Now I
23 understand in Mr. Herz's declaration that he agrees with
24 that. But from our perspective, we had no reason to know
25 anything other than that his firm represented this

1 defendant. We, therefore, believe that his firm and his
2 client were well aware of this Complaint, so we just wanted
3 to make sure the record is clear on that based on the
4 information in front of Your Honor.

5 Your Honor asked a few pointed questions to
6 defense counsel that I wanted to address.

7 Number one, is there a distinction between the
8 flexible due diligence standard and the good cause standard.
9 I don't see a marked difference in the two standards. One,
10 of course, apply in instances where the foreign country
11 exception applies, and they agree with the plain language of
12 Rule 4(m), which says that the 90-day rule only applies to
13 domestic service, which we agree with, Your Honor, and
14 which, as the Court is aware, there are plenty of cases in
15 this district that back that up.

16 I'll go into why we meet both standards, but I
17 think the analysis is more or less the same.

18 The second question Your Honor had was, what is
19 the prejudice, if any, regarding the procedures order and
20 the deadline that are in place. The answer is there is
21 absolutely no prejudice whatsoever. The reason being that
22 there is a procedures order in place for this adversary
23 proceeding. It's found on the Debtors' main docket number
24 9060, procedures order that was entered in November of 2020.

25 This particular procedures order and the avoidance

1 actions that it relates to, which are all listed in that
2 order, included many foreign adversary proceedings. And we
3 anticipated that service would, in some instances, take a
4 long time, which tends to be the case when you're dealing
5 with foreign defendants.

6 So in Paragraph 4 in the procedures order, we
7 specifically state that we'd included several foreign
8 defendants with this procedures order. Under the various
9 foreign services rules, and I'm reading this now:

10 "Service of an expired document would not be
11 proper. Accordingly, inclusion of a foreign defendants on
12 this procedures motion is intended to effectuate proper
13 service. The timeline for effectuating proper service is
14 dependent on the country of each respective foreign
15 defendant and may take several months, and in some
16 jurisdictions potentially over a year."

17 This is the important part: "To the extent that
18 deadlines contained in proposed orders need to be adjusted
19 based on the actual service date of a foreign defendant,
20 plaintiff intends on working with each foreign defendant
21 after successful service to determine if any deadlines in
22 the proposed orders need to be extended and intends on
23 freely extending as needed."

24 That's not only just lip service, Your Honor, we
25 have been honoring that. That has been our position in the

1 many foreign defendant cases that we've had in this case and
2 fully plan on honoring the same with respect to this
3 defendant if this case is allowed to proceed after today.
4 We're not trying to play gotcha or get one under Cleva Hong
5 Kong, certainly not.

6 And what we would like to do is propose a
7 scheduling order and timeframe that closely mirrors the
8 deadlines that would have been in place had service been
9 effected on a domestic defendant, so similar timeframes.
10 But I'm confident that's something I ought to be able to
11 work out with defense counsel.

12 The third question that Your Honor had posed was
13 whether there was a claim that was filed in this case.
14 There certainly was. Cleva Hong Kong filed an
15 administrative claim, I believe, so they're familiar with
16 the case and the workings and, you know, taking affirmative
17 steps to participate in the case.

18 I further believe that Cleva Hong Kong may have
19 sold its claim to a third party assignee, so I'm not sure if
20 they are technically a claimant at this time, but they
21 certainly were at one point.

22 So, Your Honor, I'd like to talk a little bit
23 about why my firm was diligent and reasonable in service and
24 why there is no prejudice to defendant, which I think is the
25 appropriate analysis under either the flexible due diligence

1 or good cause standards.

2 As the declaration points out, we were very
3 concerned, and around the time of the filing of this
4 Complaint, about the COVID-19 pandemic. Lest anyone forget,
5 this was prior to vaccinations; we were only about six
6 months really into the pandemic itself. There was a lot of
7 uncertainty and fear, a lot of office closures, a lot of
8 government-ordered shutdowns, including the two states where
9 my firm holds offices.

10 The impact of the pandemic was worldwide, perhaps
11 no more so at this particular time than China and Hong Kong,
12 which is the location of defendant. Where we, like everyone
13 else, we're reading newspaper articles and other news
14 sources and understood that there were closures in China.
15 Governmental offices were being shut down at various times.
16 Cases were peaking in the fall and winter months between
17 when this Complaint was filed and when we actually set this
18 out for service.

19 So, you know, frankly, Your Honor, we weren't sure
20 if service was possible. Certainly, our thinking was if we
21 waited -- you know, at that time I don't think anyone knew
22 how long the pandemic was going to last. But if we wanted a
23 few months, maybe things would get better, and it would be a
24 better time to attempt service.

25 So I don't think there's anything controversial

1 about that way of thinking, but I'm happy to hear from
2 defense counsel about why that type of thinking is
3 unreasonable. But we made a decision to hold off on service
4 of process, of course, knowing that Rule 4(m) and the 90-day
5 rule does not apply to foreign service.

6 The other factor going into our state of mind was
7 our awareness or our knowledge that defendant was aware of
8 the Complaint. We had already told them that we expected
9 that service would take a long time because of COVID-19
10 pandemic. We didn't see any reason why there would be
11 prejudice there when we asked defense counsel if they would
12 be willing to accept service in light of the pandemic and
13 they said no; they insisted on formal service, which is
14 their right.

15 Going into the no prejudice element.

16 THE COURT: Excuse me. Before we do that, the law
17 firm said quite promptly in October that they wouldn't
18 accept service, which I think clearly left the only
19 alternative being service through the Hague Convention or
20 even more difficult means of serving a foreign defendant,
21 which would entail the retention of a company to effectuate
22 service, which eventually was done, I guess, sometime in
23 April of 2021.

24 I understand that the plaintiff may well have
25 thought that service would be delayed in any event because

1 of COVID beyond the normal delay of serving under the Hague
2 Convention, but why not simply put that in the hands of the
3 service company -- what is it, ACB I think is their name.

4 MR. BROWN: APS perhaps.

5 THE COURT: Sorry, ABS, excuse me.

6 -- and leave it up to them as to, you know, if
7 there's a window open, they can go do it; and if not, then,
8 you know, they can't do it. But there's that step that
9 doesn't appear to be taken, which I think is the main focus
10 for the defendant here, which is hiring the service agent to
11 effectuate service abroad because they couldn't start that
12 process until they were hired to do it. And again, that
13 didn't happen until a little over six months after the
14 summons.

15 MR. BROWN: Sure, Your Honor. So it's important
16 to keep in mind that there were something like a hundred or
17 slightly less foreign adversary proceedings that the Debtors
18 were contemplating and ended up filing in the Sears and
19 Kmart cases as far as preference actions go, and we filed
20 them in a couple of waves. The first waves was in June,
21 such as the Jupiter Workshop case that we referenced.

22 But back in June or back in the summer of 2020, we
23 reached out to our process server, APS, who we use a lot for
24 foreign service, and we asked them how are we going -- what
25 is COVID going to do to the ability to serve process. And

1 the response we got was an explanation that basically APS
2 wasn't sure, the timeframes might be delayed, and it kind of
3 depends on the specific locale, but, you know, there may be
4 delays.

5 So in speaking with them and thinking about it,
6 yes, we could have put the onus on the process server to
7 say, well, here, take this paperwork; when you feel it's
8 appropriate, go ahead and send it out. Or we could have
9 just held back and waited until we thought that it would
10 make more sense to try to attempt service and then give it
11 to a process server.

12 And that's what we did here because it wasn't like
13 our process was saying, oh yes, don't worry about COVID,
14 we'll get it done. It was more, like, yeah, I mean, there's
15 some reason to be uncertain about the state of things. So,
16 yeah, we decided to hold back, rather than put the onus on
17 the process server.

18 Of course, by March, which is when we were able to
19 confirm that service had actually been successful in the
20 Jupiter case -- that was March 2021 -- that was when we
21 thought, okay, let's go ahead and give this to our process
22 server in this Cleva case so that they can send it out, and
23 that's what happened. We sent it to them in March, and they
24 were able to get it out eventually and it ended up being
25 served within 11 months from the filing date, so less than a

1 year. I'll note that the Jupiter case, service was
2 accomplished within nine months after the filing date.

3 So it's a unique situation, Your Honor, where, you
4 know, I mean, what if there was a -- I don't know what to
5 compare it to, but let's say that China was in the middle of
6 a war or something, it would, you know, justify some
7 hesitance about whether service could actually be effected
8 in China. You know, I guess, yeah, we could have given it
9 to our service of process server and said, hey, you guys
10 figure it out, or we could have just made what I think is a
11 very reasonable decision and said let's hold off on this and
12 see if things get better, and that's what we did.

13 THE COURT: Okay. So you were going to then turn
14 to the prejudice element.

15 MR. BROWN: Thank you.

16 Like I had -- so first of all, defendant did have
17 notice. I noticed in defendant's declaration that he said
18 that he had no direct correspondence with Cleve Hong Kong.
19 But his other client was, I guess, the North American
20 affiliate of Cleve Hong Kong who he was representing, and I
21 didn't see anything about him not, you know, talking with
22 that client about this.

23 I think it's fair to assume that somehow, somehow
24 this defendant got notice, whether it was through his
25 attorney who was representing him or through the affiliate.

1 I don't think it's reasonable to assume that the defendant
2 did not have notice of this Complaint at the time that their
3 counsel contacted us or shortly thereafter.

4 But, you know, it's not like we didn't give the
5 defendant an opportunity to speed up the process. So if
6 they're saying that they are prejudiced as a result of this
7 delay, well, we asked you if you would accept service and
8 get the ball rolling and you declined.

9 There is no evidence of any way that plaintiff
10 could have benefited from delaying service. Like I've said,
11 we will work with them on the deadlines. We don't expect to
12 enforce the deadlines in the procedures order and the
13 procedures order is clear on that.

14 The money that is involved in this lawsuit is
15 already in the hands of the defendant, so if there was
16 interest to be earned on this money, defendant had the
17 benefit of that. They had the benefit to use this money as
18 it pleased.

19 There's no reputational harm here, Your Honor,
20 because we're not asserting that Cleva Hong Kong did
21 anything wrong. There's no allegation of actual fraud or
22 any breach of fiduciary duty or anything like that. This is
23 a preference action based on a statutory right to recover
24 payments made in the 90 days preceding the petition date.

25 So I don't see why defendant -- and, of course,

1 they filed a claim in the case, so they've already agreed to
2 participate in this case, so I don't see how defendant is
3 prejudiced at all. On the other hand, of course, the
4 statute of limitations has run, so if Your Honor were to
5 dismiss this Complaint, we would be out of luck as far as
6 trying to bring a new Complaint against Cleve Hong Kong.

7 It's a large amount of money that we think there's
8 a good basis for avoidance and recovery that would certainly
9 benefit to the estate. The estate is by no means flush with
10 cash, so every little bit helps, and this is a big important
11 case for the estate.

12 We've already incurred the cost of foreign
13 service. Defendant has not incurred any costs, except with
14 respect to the motion to dismiss and appearing at this
15 hearing.

16 And then the other factor, Your Honor, that is
17 important and to keep in mind is the reasonable prospect of
18 service. A lot of cases talk about that or give the
19 plaintiff an opportunity to effect service if the Court
20 feels like there's a good chance that service is likely to
21 take place. And, of course, here, service has already been
22 effectuated via the proper channels. I understand that
23 defendant did not even pursue a motion to dismiss until
24 after service had been effectuated, so it's not like there's
25 any question about whether service can happen here.

1 Again, this isn't a case where it's just been
2 languishing for years. This isn't a case where we haven't
3 shown an intent to serve defendant. We were very clear
4 within a week of filing, our intent was to serve this; it
5 was just going to take some time. We'd like for you to
6 accept service, but we understand that you're not going to
7 do that.

8 But, you know, this isn't something where we have
9 one defendant of 10 and we're just kind of ignoring the
10 defendant. This isn't a case like many of these others in
11 the Second Circuit where the plaintiff was attempting to
12 serve a domestic agent of a foreign corporation where those
13 courts have found that the foreign country exception doesn't
14 apply. We've always been clear that our intent was to serve
15 this in China, and it's been less than a year.

16 So without a clear prejudice to the defendant, I
17 think the case law is pretty clear here and the facts in
18 this particular case and the unprecedented issues related to
19 the pandemic justify the Court to be able to find, you know,
20 reasonable diligence and a basis to allow service, even
21 though it was made about 11 months after the filing date,
22 and to allow the case to proceed.

23 THE COURT: Okay. All right.

24 Mr. McCarrell, do you have any response to any of
25 that?

1 MR. McCARRELL: Yes, Your Honor, if I may briefly.
2 Plaintiffs' counsel started out his presentation
3 talking about the Jupiter Workshop case and indicating there
4 were "similar" facts in that case. I've already pointed out
5 those facts are very different because in that case when the
6 plaintiffs were told that the defendant was not willing to
7 accept service, they immediately and very quickly, the same
8 day, obtained the second summons and sent it to their
9 process server for service in Hong Kong. That was, in fact,
10 one day before filing this Complaint on October 9, 2020.

11 There is absolutely no reason why they could not
12 have done the exact same thing the following day to send the
13 pleadings to their process server.

14 Your Honor, I also heard Mr. Brown suggest that,
15 or more specifically assume, that Cleve Hong Kong had notice
16 of this filing because Cleve North America was aware, and I
17 just want to be clear there's nothing in the record on that
18 point. As we sit here today, I don't know that that's true,
19 and, Your Honor, plaintiffs' counsel is certainly making a
20 lot of assumptions there in that statement.

21 As far as likening the pandemic to a war --

22 THE COURT: And let me just interrupt you. I
23 agree with you on that. I think it's one thing to say
24 defendant -- I'm sorry. It's one thing to say plaintiff may
25 have logically assumed that the same counsel would be

1 representing both companies. But it's another thing to say
2 that even if they weren't representing both companies, the
3 fact that counsel was representing the U.S. entity would
4 somehow mean that the Hong Kong company would have notice of
5 the pleading.

6 Mr. Hong Chen's declaration, it's a little
7 artfully drafted in that it says, "Cleva Hong Kong, Ltd. did
8 not receive any documentation or notice from plaintiffs of
9 the above-captioned suit before September 6, 2021."

10 On the other hand, Mr. Herz's declaration says in
11 Paragraph 3, "In talking with the Fox relationship partner
12 for Cleva Hong Kong, I understand..." -- and that's you,
13 Kevin McCarrell -- "... I understand that Fox had no direct
14 communications with Cleva Hong Kong regarding this adversary
15 proceeding." That's a little artful too, but then it goes
16 on to say, "Or otherwise until after Cleva Hong Kong
17 received the Complaint and second summons on or about
18 September 6, 2021."

19 So, you know, the supposition that counsel had
20 communicated with Cleva Hong Kong about this is
21 contradicted. That still leaves open whether Cleva Hong
22 Kong knew it from some other basis, including, you know, the
23 foreign company or just having access to the docket.

24 I don't think -- no one has suggested though or
25 said that Cleva Hong Kong filed a notice of appearance and,

1 therefore, would have gotten electronic notice of
2 everything, right? That's not in the record.

3 MR. McCARRELL: Correct.

4 THE COURT: Okay. So anyway, I interrupted you,
5 but I didn't want you to think my silence was necessarily
6 agreeing that Cleve Hong Kong had notice before September of
7 2021.

8 MR. McCARRELL: Thank you, Your Honor. Thank you.

9 Your Honor, as far as likening the pandemic to a
10 war, I don't understand the analogy here. In this case, the
11 mail never stopped, email was always going, you could always
12 pick up the phone. This was not a situation where it was
13 impossible to get communication into China.

14 And let's focus on what the process server
15 actually told plaintiffs' counsel. I think there was some
16 paraphrasing about what the process server said. But if we
17 look at Exhibit 12-2 filed by the plaintiff, which is a
18 transmission from their process server to plaintiffs'
19 counsel, on Page 3 of Exhibit 12-2, it's buried sort of in
20 the middle of the page or top middle of the page.

21 It says, "The entire process normally takes six to
22 eight months through the Central Authority in Hong Kong. An
23 equivalent alternative method for service of process is
24 outlined below." And then there's a note, "Timeframes may
25 vary due to the COVID-19 worldwide pandemic." That's a mild

1 caution there about what the possibility of a potential
2 delay.

3 And likewise, Exhibit 12-3 filed by the plaintiffs
4 is an email. The process server advises, "We are still
5 sending requests abroad. The timeframes may vary with the
6 COVID-19 worldwide pandemic. Some offices and courts may be
7 temporarily closed or have reduced hours and staff. They
8 don't always tell us, but we'll resume as their situation
9 allows."

10 Your Honor, those statements from the process
11 server hardly indicate that the plaintiffs should have sat
12 and done nothing for six months after filing the Complaint
13 before asking for a second summons, waiting another month
14 until sending it to their process server.

15 And finally, Your Honor, with respect to the
16 prejudice issue. Cleva is not some huge company; they're
17 not Sears. They have been impacted by this bankruptcy
18 filing since it was filed in 2018. And here we are three
19 years later still dealing with this issue, being held
20 hostage or the ability to make business decisions and
21 whether they are going to have a significant sum of money
22 clawed back into this estate to pay, most likely, Debtors'
23 attorneys and administrative claimants.

24 And so, Your Honor, there's absolutely a huge
25 prejudice to my client. They have a right to rely on

1 statute of limitations and timely service. As plaintiffs'
2 counsel acknowledged, they have a right to insist on proper
3 service and have no duty to accept service, and the
4 plaintiffs simply waited entirely too long to commence
5 service attempts.

6 Thank you, Your Honor.

7 THE COURT: Okay, thank you. All right.

8 I have before me a motion by the defendant in this
9 adversary proceeding, Cleva Hong Kong, Ltd., to dismiss the
10 Complaint pursuant to Bankruptcy Rule 7012, which
11 incorporates Federal Rule of Civil Procedure 12(b)(5) on the
12 basis of insufficient service of process.

13 Cleva Hong Kong, Ltd. is a foreign corporation
14 located in Hong Kong, and accordingly, a series of rules
15 pertain to proper service of it. Rule 7004 with, I believe,
16 irrelevant differences incorporates Federal Rule of Civil
17 Procedure 4 with respect to the issue before me.

18 First, the one time limit specifically stated in a
19 separate provision of Rule 7004, namely 7004(e), for when a
20 Complaint should be served, specifically states, "This
21 subdivision does not apply to service in a foreign country."

22 That leaves the reference instead to Rule
23 7004(a)(1) as far as proper service is concerned, and that
24 takes one to Federal Rules of Civil Procedure 4. Rule
25 4(c)(1) states, "In general, a summons must be served with a

1 copy of the Complaint. The plaintiff is responsible for
2 having the summons and Complaint served within the time
3 allowed by Rule 4(m) and must furnish the necessary copies
4 to the person who makes service."

5 Rule 4(m) of the Federal Rules of Civil Procedure
6 states:

7 "If a defendant is not served within 90 days after
8 the Complaint is filed, the Court, on motion or on its own
9 after notice to the plaintiff, must dismiss the action
10 without prejudice against that defendant or order that
11 service be made within a specified time. But if the
12 plaintiff shows good cause for the failure, the Court must
13 extend the time for service for an appropriate period. This
14 (m) does not apply to service in a foreign country under
15 Rule 4(f), 4(h)(2), or 4(j)(1) or to service of a notice
16 under Rule 71.1(d)(3)(A)."

17 And those subsections of Rule 4 do apply to
18 service in a foreign country. 4(f)(1) states that, "Unless
19 federal law provides otherwise, an individual may be served
20 at a place not within any judicial district of the United
21 States, (i) by any internationally agreed means of service
22 that is reasonably calculated to give notice, such as those
23 authorized by the Hague Convention or the service abroad of
24 judicial and extrajudicial documents."

25 THE COURT: I will note here that the Defendant

1 was eventually served, and I believe this is undisputed, but
2 in any event, based on the certificate of service, even if
3 there were a dispute, it's clear was eventually served under
4 the Hague Convention in Hong Kong, China and the United
5 States both being participants in that convention.

6 Then, Rule 4(h) states that, unless federal law
7 provides otherwise, or the defendant's waiver has been filed
8 a domestic or foreign corporation, or partnership, or other
9 unincorporated association that is subject to suit under a
10 common name, must be served.

11 And then we go to subsection 2: At a place not
12 within any judicial district of the United States, in any
13 manner prescribed by Rule 4(f) for serving the individual.

14 So, at least by its plain terms, the 90-day limit
15 under Rule 4(m), including as incorporated by Rule 4(c),
16 would not apply to service under the Hague Convention, on a
17 foreign corporation, as was done here.

18 However, the Second Circuit has put its own gloss
19 on those rules in a series of cases, which, the extent of
20 which still remains, to my mind, somewhat unclear. It's
21 fair to say that that gloss started with *Montalbano v. Easco*
22 *Handtools, Inc.*, 766 F.2d 737 (2d Cir. 1985).

23 There, the Plaintiff had not served the moving
24 Defendant within the then-applicable time for service, which
25 was 120 days, in effect at that time.

1 And the Court noted as follows: "Where service of
2 process is insufficient, the Courts have broad discretion to
3 dismiss the action or to retain the case, but quash the
4 service that has been made on defendant," quoting 5(c),
5 Wright and Miller, Federal Practice and Procedure, Section
6 1354, 585, 1969. And then, continuing on with the quote
7 from the opinion, "Even though service would ordinarily be
8 quashed and the action preserved, where there is a
9 reasonable prospect, the plaintiff ultimately will be able
10 to serve defendant properly." Citation submitted.

11 Here, the District Court did not contravene
12 subdivision 4(j), even though it did not preserve the
13 action. Subdivision 4(j), with its foreign country
14 exception to its 180-day period for service, is simply
15 inapplicable here, because Easco never attempted to serve
16 process in a foreign country under Subdivision 1; the 120-
17 day time limit imposed by Rule 4(j) seems, therefore,
18 perfectly proper, especially since Easco -- that is the
19 Plaintiff -- has not exactly bent over backward to affect
20 service. So saying, we hold the dismissal of OH for failure
21 to make service is proper, nothing that such dismissal is,
22 in any event, conditional.

23 This, obviously, is not exactly the clearest
24 exposition of any sort of per se rule, as asserted by the
25 motion, that if a plaintiff fails to commence service within

1 the 120-day period, but thereafter does so, it is somehow
2 not within the limits of a time period under the federal
3 rules.

4 First, here, service was never commenced, it
5 appears. Secondly, the -- in the foreign forum that is --
6 so, therefore, their 120-day period would, logically, apply
7 under the rule, because service was tried to be commenced in
8 the United States instead, where Rule 4 and 4(j) would not
9 have any exception.

10 And in any event, the Court focused on the
11 diligence of the Plaintiff in trying to effectuate service,
12 which might or might not apply to foreign service, but also
13 could, as easily, I believe, apply to good faith attempts
14 service in the United States. But that, clearly, is not the
15 last word in the Second Circuit on timeliness limitations on
16 proper service of a foreign defendant.

17 Two decisions appeared in 2005 discussing the
18 issue. The first was USHA (India), Limited v. Honeywell,
19 International, Inc., 421 F.3d 129, (2d Cir. 2005). In that
20 case, again, the foreign defendant was never served with
21 process. As noted at page 133. The Court then quoted
22 Federal Civil Procedure 4(m), which had, again, the 120
23 period instead of the 90-day period. But as the Court
24 noted, creates an exception for service for a foreign
25 country, pursuant to subdivision F.

1 The Court then stated, "This exception does not
2 apply if, as here, the Plaintiff did not attempt to serve
3 the Defendant in the foreign country," citing Montalbano, id
4 at page 134.

5 Again, therefore, one logically, under Montalbano,
6 would apply the time limit in Rule 4(m), because there was
7 no attempt to serve the defendant in the foreign country.

8 Then, in December of 2005, the circuit, in a
9 summary order, Russo Securities v. Ryckman, 159 Fed. App'x
10 294, (2d Cir. December 15, 2005), stated, "The District
11 Court did not abuse its discretion in dismissing Lawrence
12 Rickman's crossclaim against Alparco.

13 There is no merit to Rickman's argument that they
14 should be excused from diligently pursuing a crossclaim that
15 was filed by his lawyer on his behalf because he did not
16 know about it." In any event, whereas here, a party does
17 not attempt service of process on a foreign defendant such
18 as Alparco, related claims may be dismissed pursuant to the
19 120-day time limit established by Federal Rule of Civil
20 Procedure 4(m), and the exception for service of process for
21 foreign entities is inapplicable; citing again, Montalbano
22 v. Easco. Again, the crossclaim plaintiff had made no
23 attempt to serve, whether in or outside of the 120-day
24 limit.

25 Finally, in DEF v. ABC, 366 Fed. App'x. 250,

1 (February 18, 2010), cert denied, para. Humanitarian
2 Foundation, Inc. v. Banco Cent. Del para. 2010 U.S. LEXIS
3 5266, (US June 28, 2010).

4 The Circuit said the following: "Defendant's
5 third-party complaint against the banks in liquidation was
6 also correctly dismissed. Defendants waited two years
7 before attempting to serve process on the banks in
8 liquidation, and never successfully served process on them.
9 We have previously held inapplicable the foreign country
10 exception to Federal Rule of Civil Procedure 4(m)'s 120-day
11 time limit for service, where a party did not attempt
12 service within the 120-day limit, and not exactly bent over
13 backward to affect service," citing Montalbano. "Likewise,
14 we do not find that the District Court abused its discretion
15 here where Defendants waited two and a half years to attempt
16 service, never effective service, and did not explain why
17 they not been able to affect service."

18 Clearly, in that case, the circuit posited at
19 least a relevant consideration, i.e., where service was not
20 attempted within the 120-day limit, which was not present in
21 the other cases that I've just gone through. But that was
22 not a conclusive factor, even as a new factor, because here,
23 in the DEF v. ABC opinion, the Court went onto say that the
24 plaintiff had not exactly bent over backward to affect
25 service and, in fact, waited two and a half years to attempt

1 service and never affected service, and did not explain why
2 they had not been able to affect service.

3 Having summarized the Circuit Court cases, and
4 their exegesis on the so-called foreign country exception to
5 Rule 4(m)'s deadline, I will note, however that a number of
6 lower court's have taken the view that the exception applies
7 only if the plaintiff makes an attempt to begin service on a
8 foreign defendant within 120 days. See, for example,
9 Trilliant Funding Inc. v. Marengere (In re Bozel S.A.) 2017
10 U.S. District LEXIS 116135, (S.D.N.Y. July 25, 2017). And
11 Astor Chocolate Corp. v. Elite Gold Limited, US Dist. LEXIS
12 78862 (S.D.N.Y. May 5, 2020), at page 14 through 15.

13 Both of those cases cite the Honeywell case,
14 which, arguably, does not stand for that proposition, as
15 well as DEF v. ABC, which has other factors noted in
16 affirming the Court's exercise of its discretion to dismiss,
17 in addition to that proposition.

18 Both of those opinions then state, when the
19 foreign country exception does apply, the Court uses a
20 flexible due diligence standard to determine whether service
21 of process was timely.

22 Under that standard, the plaintiff bears the
23 burden of proving that it exercised due diligence in not
24 timely serving the defendant. The Court assesses the
25 reasonableness of the plaintiff's efforts and the prejudice

1 to the defendant from any delay, and can exercise its
2 discretion, notwithstanding the fact that the rule itself
3 appears to have no limitation on time of serving a complaint
4 on a foreign entity. See *In re Bozel*, SA 2017 U.S. Dist.
5 LEXIS at 2, and *Elite Gold*, 2020 U.S. Dist. LEXIS 78862 at
6 page 15.

7 There are other courts that have held that the
8 exception does apply, even if the service occurred, or
9 efforts to -- I'm sorry -- even if efforts to make service
10 initiated after the applicable time period, whether it's 120
11 or 90 days, based on the date that the rule applies. See,
12 for example, *In re Teligent Inc.*, 372 BR 594, (S.D.N.Y.
13 2007).

14 In any event, and obviously quite properly, the
15 Courts don't provide a blank check for the time to serve a
16 foreign defendant. And, as I've noted, apply the flexible
17 due diligence standard.

18 Moreover, even the courts that do not apply the
19 foreign company exception to Rule 4(M), recognize that Rule
20 4 itself provides discretion as well as a mandatory good
21 faith exception to the requirement otherwise to dismiss,
22 under Rule 4(M). Again, see *Elite Gold*, 2020 U.S. Dist.
23 LEXIS 78862, at page 15 through 16, and *In re Bozel*, S.A.

24 As far as I can tell, and the parties have not
25 disagreed with this proposition, there appears to be very

1 little difference between the flexible discretion standard
2 and the Court's analysis of the exceptions to Rule 4(M)'s
3 90-day period within Rule 4(M) and Rule 4, separate and
4 apart from the foreign defendant exception.

5 As noted, again, by the Elite Gold case, the
6 factors to be considered there are quite similar to the
7 factors applicable under the flexible due diligence
8 standard. The existence of those exceptions was applied and
9 discussed in Zapata v. City of New York, 502 F.3d 192, (2d
10 Cir. 2007), which did not apply or deal with a foreign
11 defendant at all, but instead applied other exceptions to
12 the then 120-period in Rule 4(M).

13 Noting that, the Court, under the rule, is guided
14 by a proviso to the rules provision, that the Court shall
15 dismiss the actual (indiscernible) without prejudice, or
16 direct that service be affected within a specified time
17 provided that if the plaintiff shows good cause for the
18 failure of the Court, shall extend the time for service for
19 an appropriate period.

20 In addition, as discussed at length in the Zapata
21 opinion, the Court held, "That District Courts have
22 discretion to grant extensions, even in the absence of good
23 cause," id at 196.

24 Again, the focus there is on similar factors as
25 under the flexible due diligence standard that I've already

1 described, namely the Court's exercise of its discretion
2 must be informed by its analysis of the impact that a
3 dismissal or extension, one or the other, would have on the
4 parties; including a focus on the effect on the parties of
5 the potential running of an applicable statute of
6 limitations, which was the primary focus, as well as whether
7 the Plaintiff had shown a colorable excuse for not serving
8 the Defendant in a timely fashion.

9 Although, importantly, in footnote 8 to the Zapata
10 opinion, the Circuit said the following: "Because Zapata
11 was denied an extension, we express no opinion on what
12 circumstances will indicate an abuse of discretion, where a
13 district Court has granted an extension, without a showing
14 of good cause. While we read Bogle-Assegai to indicate that
15 this Court would not disturb a District Court's dismissal
16 absent some colorable excuse raised by the Plaintiff.
17 Nothing, in our opinion, should be read as a per se rule,
18 that District Courts must require such an excuse in all
19 cases."

20 Having said that, I will note that in the case
21 law, courts generally have, since Zapata, focused on whether
22 there's at least a colorable excuse for the delayed service,
23 and not focused on prejudice unless there was such an
24 excuse. See, for example, Kogan v. Facebook, Inc., 334
25 F.R.D. 393, 403 (S.D.N.Y. 2020). See also Smith v. Bray, B-

1 R-A-Y, 2014 U.S. Dist. LEXIS 158488, (S.D.N.Y. November 10,
2 2014) at page 15. "To obtain a discretionary extension
3 absent a showing of good cause, the Plaintiff must
4 ordinarily advance some colorable excuse for neglect, citing
5 Zapata, note 7. Courts balance the justifiable excuses
6 offered by the Plaintiff, the length of the delay and any
7 prejudice to either party,".

8 And then, finally, see Klein, K-L-E-I-N, v. VA,
9 2019 U.S. Dist. LEXIS 46412, (W.D.N.Y. March 2019), at page
10 11, where the Court, in fact, went further and stated,
11 "Moreover, Zapata recognizes that a District Court need not
12 require that the plaintiff raise a colorable excuse in order
13 to exercise its discretion to grant an extension of time for
14 service." And, rather summarily, therefore, denied
15 defendant's motion.

16 Although it noted that it had, the plaintiff had
17 recognized, had articulated some form of an excuse for not
18 serving in a timely way, which would, in addition to the
19 effect of losing the cause of action, because of a time bar
20 required a dismissal.

21 The facts here that are undisputed are as follows:
22 Plaintiff's adversary complaint was filed October 9, 2020,
23 and the summons was issued October 14, 2020. Almost
24 immediately after the filing of the complaint, the law firm
25 that had appeared for a domestic affiliate of the Defendant,

1 Cleva Hong Kong Limited; contacted counsel for the
2 Plaintiff, Sears, to note that the complaint had been filed.
3 And, as noted in the email chain exhibits to the Lubis
4 declaration, there ensued, in a very short period, an
5 exchange whereby counsel for the Plaintiff responded to that
6 inquiry by noting that, while there would be much to talk
7 about, it was likely that the matter would be put on hold
8 for a long time, given the nature of the defendant being a
9 foreign entity and the COVID pandemic, which was also
10 acknowledged in the initial email that came from counsel,
11 for the US affiliate.

12 In reviewing that email chain, it is clear, I
13 believe, that counsel never disavowed that it was counsel,
14 not only for the US affiliate, but also for the Defendant,
15 Cleva Hong Kong Limited; nor did it state that it was
16 counsel in Cleva Hong Kong Limited. It is also clear that
17 by mid-October, counsel for the US affiliate had made it
18 clear to counsel for the Plaintiff, that it would not accept
19 service for the Defendant. In so doing, it did not state
20 that it was, again, not -- it again, did not state that it
21 was not counsel or the Defendant, just that it was not
22 authorized to accept service.

23 After this exchange, apparently, nothing happened
24 in this lawsuit for approximately six months. A second
25 summons was issued March 5, 2021; the first one, again,

1 having been issued October 14, 2020. And relatively soon
2 thereafter, in April, the summons was provided to a company
3 called APS International for service under the Hague
4 Convention. Thereafter, it was, in fact, served on
5 September 16, 2021, under the Hague Convention.

6 And the same counsel that responded to the filing
7 of the complaint by initiating contact with Plaintiff's
8 counsel, is now representing Cleva Hong King Limited in this
9 adversary proceeding.

10 Cleva Hong King Limited has submitted declarations
11 by its President and CEO, Hong Chen, which states, in
12 paragraph 3, "Cleva Hong Kong Limited did not receive any
13 documentation or notice from plaintiffs of the above-
14 captioned suit, before September 6, 2021." And a
15 declaration by one of the lawyers at Cleva Hong Kong's
16 counsel, which also was counsel for the US affiliated, Cleva
17 North America, which states, in paragraph 3: "Fox was not
18 ..." -- that's the law firm, -- "Fox was not attained by Cleva
19 Hong Kong to represent it in this adversary proceeding until
20 on or about September 29, 2021, approximately one week
21 before filing the motion to dismiss, on October 6, 2021."

22 Further, in talking with the Fox relationship
23 partner for Cleva Hong Kong, Kevin McCarrell, I understand
24 that Fox had no direct communications with Cleva Hong Kong,
25 regarding this adversary proceeding, or otherwise, until

1 after Cleva Hong Kong received the complaint and second
2 summons on or about September 6, 2021.

3 Although the Plaintiff's counsel has argued that
4 Cleva Hong Kong Limited had notice of the adversary
5 proceeding, shortly after it was filed, at best, therefore,
6 there's a disputed issue as to whether it did, with evidence
7 to indicate to the contrary that it could not.

8 Based on my review of the case law, by which I'm
9 governed, notwithstanding what appears to me to be the plain
10 language of Rule 7004 and Rule 4(M), and (F) and (H), I must
11 weigh the exercise of reasonable due diligence, or a
12 colorable basis for there not being negligence in turning
13 over the summons to be served, approximately six months
14 after the summons was issued; that is, the first summon.
15 And the prejudice, if I find the sufficient basis, to go
16 further and look at prejudice resulting from the ultimate
17 service here, roughly 330 days after the issuance of the
18 original summons.

19 I will note that no court, I think, has given any
20 bright line date for a lapse of time being too long between
21 the issuance of a summons and service on a foreign
22 defendant. But it appears to me, from the case law --
23 although I've obviously not read every case on this issue --
24 that cases that state that service has been too delayed,
25 have involved one of two factors: either, first, that

1 service was never made, which was clearly the case in
2 certain of the Second Circuit cases, the cases from the
3 Second Circuit Court of Appeals that I've previously cited,
4 as well as Yellowave Court v. Mana, 2000 U.S. Dist. LEXIS
5 14813 at page 7, (S.D.N.Y. October 11, 2000) or,
6 alternatively, where service was made only well after a year
7 after the summons was obtained. See In re Bozel, S.A., 2017
8 U.S. Dist. LEXIS 116135 at page 7, which applied the
9 flexible due diligence standard; which, frankly, appears to
10 me, largely on all fours with the discussion in Zapata, as
11 applied by the cases, where there were gaping periods of
12 inactivity and a delay of ten months before speaking with
13 defendant's counsel, and another five months before the
14 defendant was located and served at its foreign address, and
15 the time to serve after filing was 25 months.
16 In DEF v. ABC, 366 Fed. App'x at 253, the dismissal was
17 appropriate, where the Plaintiff waited two and a half years
18 to attempt service, without excuse.

19 In Travers Tool Company v. Southern Overseas
20 Express Line, Inc., 2000 U.S. Dist. LEXIS, 1582 at page 5,
21 (S.D.N.Y. February 17, 2000), under the flexible due
22 diligence standard, an extension was not granted, where the
23 plaintiff gave no explanation why there were no efforts,
24 over the last year, to serve.

25 Here, it's clear and, I believe, not disputed,

1 that a reasonable sign for service under the Hague
2 Convention, during this period, where COVID affects the
3 conduct of various businesses, is roughly six to eight
4 months. And, therefore, the time between the issuance of
5 the second summons in March of 2021, and actual service in
6 September of 2021, would not appear to be anything out of
7 line.

8 There's no indication that during that period, in
9 fact, there was any lack of due diligence, but rather that
10 the -- it appears to me, clear that the APS International
11 Service agent acted diligently under the circumstances, to
12 effectuate service under the Hague Convention in Hong Kong.
13 The issue is whether the delay between the issuance of the
14 summons in October of 2020, mid-October of 2020, and
15 initiating the actual service, in April of 2021, a period of
16 about 180, 190 days, was not sufficiently diligent or was,
17 in the phraseology of the Zapata case law, not colorably --
18 or colorably, not negligent.

19 It appears to me, under the circumstances, that
20 that delay was justified in some measure by the following:
21 First, and most important, I believe the Plaintiff could
22 have reasonably assumed that counsel or the US affiliate
23 that had initiated contact when the complaint was filed,
24 was, in fact, aware of the complaint, of course. But, more
25 importantly, would be representing the defendant,

1 ultimately. And it had been assured that the matter would
2 not be going forward for a long time, until service was
3 effectuated.

4 Secondly, although this is just barely colorable,
5 Plaintiff has stated that given the effects of COVID in the
6 fall of 2020, going through the winter into early 2021,
7 when, in many places around the world, COVID was at its
8 height, it chose not even to provide the summons and
9 complaint to the APS International Service Agent, in the
10 belief that service would be unduly delayed, in any event,
11 until the COVID situation became clearer. And only decided
12 to do so when it saw that service had been effectuated in
13 March of 2021, in Hong Kong, in another adversary
14 proceeding, in the Sears case, the Jupiter adversary
15 proceeding; thus showing that service could, in fact, be
16 effectuated, notwithstanding COVID.

17 I say that's just colorable because, again, it
18 takes several months to effectuate service under the Hague
19 Convention, in Hong Kong. And, therefore, the service in
20 the Jupiter lawsuit started months before, when it was
21 actually effectuated in March of 2021.

22 So, my main focus is on the reasonableness of the
23 Plaintiff's counsel's belief that the Defendant would be
24 aware of this lawsuit, from its inception, given that
25 counsel for the US affiliate initiated contact with

1 Plaintiff's counsel; essentially, right after the lawsuit
2 was filed, and never disavowed that it wasn't representing
3 the Defendant, as well as the US affiliate, and was under, I
4 think, no misimpression that the Defendant was different
5 than the US affiliate, and a foreign entity.

6 I believe that that is sufficient to take the
7 Court to the analysis of prejudice to the parties, and any
8 related inequities that would be caused by, on the one hand,
9 granting the motion and dismissing the lawsuit, and on the
10 other, denying the motion.

11 I don't believe there are any particular
12 inequities, or inequitable conduct, by the Defendant, or its
13 counsel. The Defendant did not evade service of process.
14 It did not lead on the Plaintiff as to whether it, through
15 its US counsel, accept process; to the contrary, it
16 promptly, counsel promptly informed Plaintiff's counsel that
17 it would not accept process. And therefore, the delay here
18 is not specifically attributable to any, I think, strategic
19 conduct undertaken by Defendant.

20 On the other hand, as I've said, I believe
21 Plaintiff did reasonably infer that counsel was aware of and
22 did not disavow its representation of the Defendant when it
23 initiated the contact, after the complaint was filed.

24 The underlying lawsuit is, as noted by counsel for
25 the Defendant during oral argument, a typical action to

1 avoid preferential transfers. As everyone who has any
2 remote contacts with the Bankruptcy Code as it applies to
3 preferential transfers, there is nothing wrong with
4 receiving a preferential transfer. The preference avoidance
5 statute is a legislative construct designed to further the
6 policy of equality of distribution by, in effect, looking
7 back 90 days before the petition date to transfers that
8 preferred, simply by being made, some creditors over those
9 who did not receive transfers, and providing, therefore, for
10 their avoidance and the sharing of the transfer among all
11 the similarly situated creditors.

12 The amount at issue is significant. In the
13 aggregate, it's over \$14.5 million of allegedly preferential
14 transfers that are being sought to be avoided here. But the
15 lawsuit does not cause any reputational harm to the
16 Defendant, and more importantly, the funds at issue are in
17 the Defendant's hands. And there's no prejudgment
18 attachment or any such remedy available. Further, if
19 there's any disparity between any interest earned on the
20 money, pending any judgment, and the right to prejudgment
21 interest, I believe the Court has the power to apply an
22 equitable exception to prejudgment interest, in light of the
23 delay between the issuance of the summons and the actions to
24 effectuate service here.

25 But, in any event, there's no benefit to the

1 Plaintiff by delay. The Plaintiff has every reason to
2 expedite the lawsuit, to bring in, if the lawsuit has merit,
3 value to the estate.

4 The Zapata case makes it clear, quoting the
5 official comment to the 1993 amendment to Rule 4. That
6 prejudice, generally, deriving from the expiration of a
7 statute of limitations, before the lawsuit can be reserved,
8 is prejudiced to the Plaintiff, Zapata 502 F3d at 195
9 through 96.

10 It does go onto state that prejudice may also be
11 found to a defendant based on the defendant's reasonable
12 reliance on a statute of limitations. But it does appear to
13 me that the prejudice here to the Plaintiff, far outweighs
14 the prejudice to the Defendant under the facts before me.
15 The amount of time we're talking about here, where there was
16 a delay, is, as I said, roughly six months; which is not, I
17 believe, a material time, affecting any reasonable reliance
18 issues.

19 Whereas, on the other hand, the Plaintiff and its
20 creditors, for whom this action is being brought, would
21 suffer serious prejudice based on the running of the statute
22 of limitations, if I granted the motion.

23 The Defendants have also, Defendant has also
24 asserted that my order that's currently in effect, setting
25 forth procedures for the initial stages of preference

1 actions in this bankruptcy case, sets forth certain
2 deadlines that will have passed. And if the order remains
3 in effect to this lawsuit, that could prejudice the
4 defendant.

5 However, paragraph 4 of the procedure's order,
6 acknowledges that there would be material delay in serving
7 foreign defendants, and that under those circumstances, it's
8 anticipated that the deadlines would freely be extended as
9 needed, based on the actual date of service.

10 Even if that were not in, that paragraph, were not
11 in the order, I would clearly impose such relief here, so
12 that the deadlines, which were intended only to maximize the
13 efficient administration of these lawsuits, and not to give
14 any party, either Plaintiff or Defendant, a leg up. All the
15 other would do just that, and not prejudice the Defendant,
16 i.e., would just enable the lawsuit to be dealt with
17 procedurally on an efficient basis, building in the
18 opportunity for settlement discussions, mediation, and the
19 like, as well as a recognized process for dealing with
20 discovery disputes and the like.

21 So, I find that the factor of prejudice
22 significantly and strongly argues that the motion should be
23 denied, and that the Plaintiffs delay here. And again, I'm
24 focusing on the six months, roughly, between the issuance of
25 the summons and the commencement of the foreign process

1 service is not so egregious or so unreasonable, as to
2 require me to overlook that prejudice.

3 As I noted, I've not been able to find a case
4 where such a delay was found to warrant dismissal,
5 especially given the circumstances here, the nature of the
6 lawsuit and the balance of harms, as between the two
7 parties.

8 So, I will deny the motion and ask counsel for the
9 Plaintiff to submit an order to that effect. It should just
10 refer to my bench ruling; it doesn't need to recite any
11 aspect of it. You don't need to formally settle that order
12 on counsel for the Defendant. But you, obviously, need to
13 copy them when you email it to chambers and you might as
14 well run it by them for a day or so before you submit to
15 chambers.

16 So, are there any questions?

17 MR. HERZ: Thank you, Your Honor. I did want to
18 make one comment that I realize, as you were making the
19 ruling, the reference I made to Docket entry 9060, with the
20 language on paragraph 4 about giving foreign defendants more
21 time and extending deadlines, that is the procedures motion
22 that we filed; it was not the procedures order.

23 THE COURT: But in any event, you've agreed to
24 that relief.

25 MR. HERZ: That's correct.

1 THE COURT: And I granted the motion on that
2 basis. But I appreciate your clarifying that. Okay. Thank
3 you both.

4 MR. HERZ: Thank you, Your Honor.

5 MR. BROWN: Thank you, Your Honor.

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7 (Whereupon these proceedings were concluded at
8 2:06 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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Date: December 15, 2021